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Supreme Court of the United States

October Term, 1942. No. 824.

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., and LAWRENCE WARDS ISLAND REALTY COMPANY,

Petitioners,

against

THE CITY OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

April 9, 1943.

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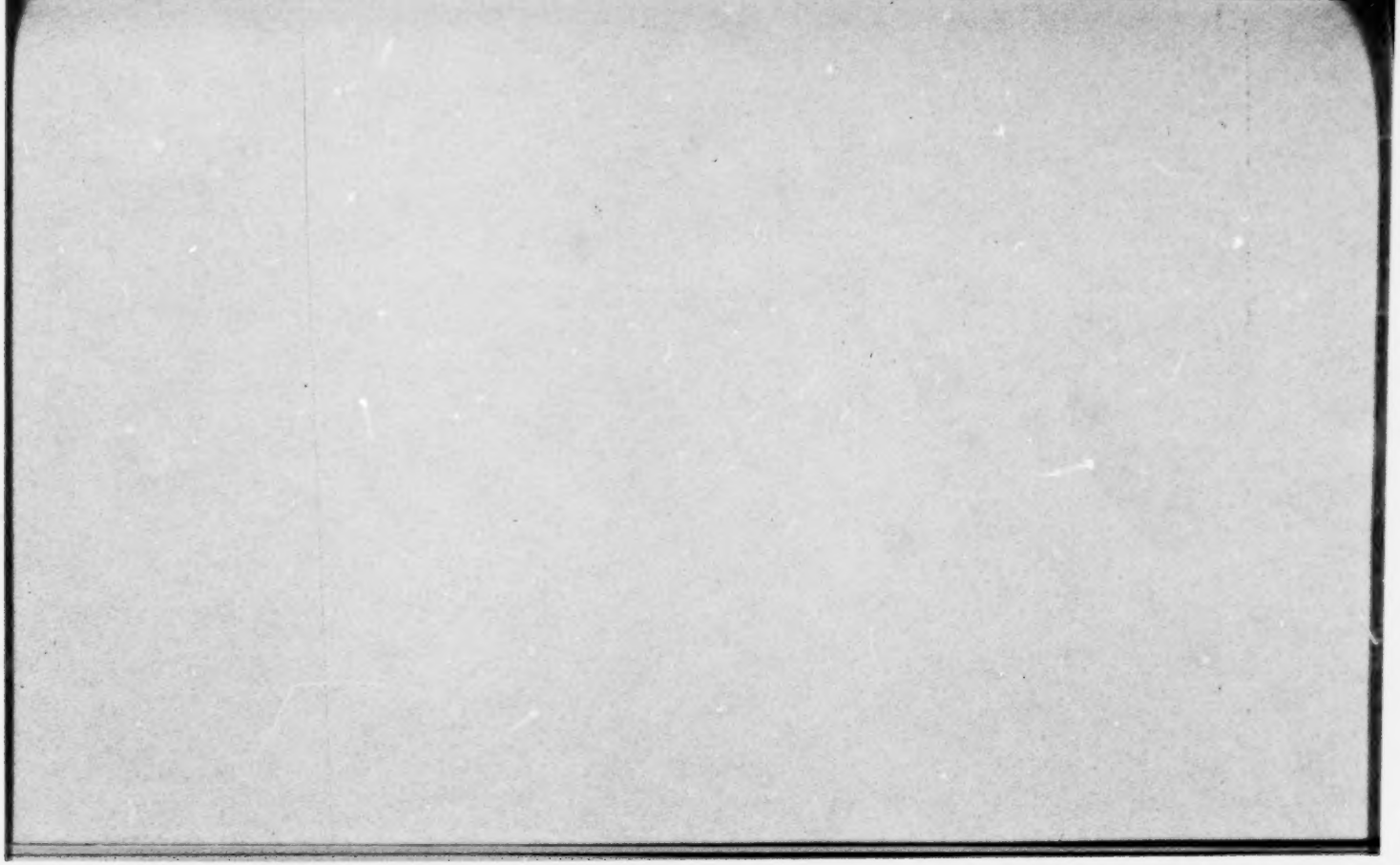

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The discursive petition which has been filed herein is devoted, to the extent of about 90% of its contents, to the discussion of questions of state law, which obviously cannot be reexamined in this Court. The federal questions lack merit, as we shall proceed to show.

(1)

The argument, stated in the heading to Point I of the petition, that the award is inadequate because nominal ($1), raises no federal question, for the reason that, upon the facts shown in the record, the petitioners' rights were reduced to nominal dimensions by principles of state law of universal application and unquestioned constitutionality, to wit:

(*a*) there can be no ownership of lands under water divorced from ownership of the adjacent upland;

(*b*) any person who, by some artificial construction of a deed, found himself the owner of such lands under water, could not use the lands under water for any other purpose than passage, and, if he attempted to erect permanent structures thereon would at once be subject to a suit for a mandatory injunction at the instance of the upland owner.

To these principles of law should be added, as a reenforcement, the factual circumstance that, granting, for the sake of argument, that petitioners had the right to fill in the lands under water claimed by them, the cost of filling in would be greater than the worth of the lands after filling in was completed (R. 240-241). Thus again their value to the petitioners was purely nominal.

In support of proposition (*a*) *supra*, we may cite N. Y. Laws 1786, ch. 67, which was reenacted in substance by L. 1801, ch. 69. These were cited and relied on by the Supreme Court, New York County, herein (R. 230). See also *Blakeslee Mfg. Co.* v. *Blakeslee's Sons Iron Works*, 129 N. Y. 155 (1891), where the Court said (pp. 159-160):

> "The right or privilege conferred by the statute is appurtenant to the upland and vests in the owner thereof, and it never can exist severed from such ownership. The title set up by the defendant under mesne conveyance from Quimby of the lands under water in front of the Gregory and Smith lot cannot, therefore, prevail."

This, and other cases to the same effect, will be found analyzed at some length in the opinion of the Supreme Court, New York County (R. 232-236). See also *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 435 (1892).

In support of proposition (*b*) *supra*, we may cite *Matter of City of New York*, 168 N. Y. 134, 144 (1901); *City of New*

York v. *Wilson & Co.*, 278 N. Y. 86, 100, 101 (1938); and *City of New York* v. *Third Ave. Ry. Co.*, 264 App. Div. 193, 194, 34 N. Y. Supp. (2d) 874 (1st Dept., 1942). See also *Illinois Central R. Co.* v. *Illinois, supra*, 146 U. S., at pp. 445-447.

The principle has been adhered to so consistently that if the riparian owner builds, for example, a restaurant upon piers extending over the water, the structure cannot be made the basis of a claim for compensation when the City later takes title to the upland and the foreshore in eminent domain proceedings. See *Matter of City of New York (Neptune Avenue)*, 254 App. Div. 690, 3 N. Y. Supp. (2d) 825 (2nd Dept., 1938), aff'd 280 N. Y. 604 (1939), where the Appellate Division said (p. 690):

> "Nor is appellant Lundy entitled to any award for the structures maintained on the damage parcels in which he had riparian rights and on the bed of Ocean avenue to the west, in which he had no right whatever. The erection of such structures and their use as a restaurant are not a proper exercise of riparian rights."

Of course had the structures been wharves and piers erected in aid of commerce and navigation, the Courts would have had to entertain the claim for compensation. *Appleby* v. *City of New York*, 271 U. S. 364 (1926). The reliance of the petitioners (brief, pp. 6, 8) on this case is thus clearly seen to be misplaced.

(2)

The contention that the obligation of contracts clause has been violated is made quite inarticulately in this Court. All that petitioners say (p. 11) is that the grant of 1811 (Claimants' Ex. 6, listed at R. 252 but not reprinted) "contained the implied agreement by the Grantor States [*sic*]

that it would not grant the same lands to anyone else if the original grant were defective."

Now the grant of 1811 was of lands under water to a person not the owner of the upland, and was void for contravention of the statutes cited *supra*, page 2. It was void for all purposes, and did not even possess such latent vitality as would operate 77 years later to prevent a new grant of lands under water to the then owner of the upland, the City of New York. Certainly a holding of the state courts to this effect does not affront the contracts clause; for the holding is simply one of consistent adherence to, and respect for, the policy declared by the legislation of 1786 and 1801, cited *ante*, page 2. The earlier grant having been abortive and void, it could create no contract rights entitled to constitutional protection.

(3)

The statement of the petitioners (p. 1) that the "United States is interested in this proceeding" is a ridiculous *ad captandum* attempt to exalt an unmeritorious case into one worthy of this Court's attention. The title of the Government to the lighthouse site on Ward's Island is in no way aspersed. We put in evidence our deed to the Government (City's Ex. 28, R. 146-147) to show that the area of the site was excepted from the condemnation, and to show that at the date of the deed (1905) the City (and not the petitioners or their predecessors) had title to, and was exercising a *jus disponendi* over, the general area in question.

(4)

The petitioners' want of confidence in their constitutional point is manifested by the circumstance that they took their appeal from the decision of the Appellate Division to the Court of Appeals of the State of New York, *by*

leave of the Appellate Division. 263 App. Div. 809, 33 N. Y. Supp. (2d) 812. Under the Constitution and Civil Practice Act of the State of New York an appeal to the Court of Appeals may be taken *as of right* from an order of unanimous affirmance in the Appellate Division, in cases where there is directly involved the construction of the Constitution of the United States or the validity thereunder of a statutory provision of the State.

(5)

It is significant also that the petitioners are unable to show to this Court a certificate from the Court of Appeals to the effect that a question under the United States Constitution was raised and necessarily passed upon in deciding the appeal. For the form of such certificate which the Court of Appeals constantly uses in cases of this sort to facilitate the review of its determinations by this Court, see *People* v. *Kesbec, Inc.*, 282 N. Y. 777 (1940), and *People* v. *Beck*, 288 N. Y. 672 (1942), cert. den. 317 U. S. , 63 Sup. Ct. 433 (1943).

Conclusion.

The petition for certiorari should be denied.

April 9, 1943.

Respectfully submitted,

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PAXTON BLAIR,
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